

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PICOT, ET AL,) CV-12-1939-EJD
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.)
) AUGUST 2, 2012
WESTON,)
)
DEFENDANT.) PAGES 1-23
)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WM. TERRELL HODGES
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: LAW OFFICE OF THOMAS M. BOEHM
BY: THOMAS BOEHM
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LOS GATOS, CA 95030

FOR THE DEFENDANT: LAW OFFICE OF DAVID H. SCHWARTZ
BY: DAVID SCHWARTZ
ONE MARKET PLAZA
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OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

1 SAN JOSE, CALIFORNIA

AUGUST 2, 2012

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENED AND THE FOLLOWING
4 PROCEEDINGS WERE HELD:)

5 THE COURT: THE NEXT AND LAST CASE IS THAT OF PICOT
6 AND MANOS AGAINST WESTON.

7 MR. BOEHM: GOOD AFTERNOON, JUDGE. THOMAS BOEHM FOR
8 PLAINTIFFS.

9 WE ARE, OF COURSE, OPPOSING THE MOTION.

10 MR. SCHWARTZ: DAVID SCHWARTZ APPEARING FOR DEFENDANT
11 DEAN WESTON, YOUR HONOR.

12 THE COURT: LET ME HEAR FROM THE PLAINTIFF FIRST WITH
13 RESPECT TO THIS MOTION TO DISMISS FOR LACK OF PERSONAL
14 JURISDICTION.

15 THE DEFENSE HAS BROUGHT EVIDENCE AND I'VE READ THE
16 DECLARATIONS OF MR. MANOS AND MR. PICOT WHICH YOU SUBMITTED
17 ABOUT THIS JURISDICTIONAL ISSUE.

18 IT APPEARS MR. WESTON MADE TWO TRIPS TO CALIFORNIA ON TWO
19 DIFFERENT OCCASIONS, EACH ABOUT A WEEK IN DURATION.

20 IT'S NOT CLEAR TO ME EXACTLY HOW HIS ENDEAVORS ON THOSE
21 TWO OCCASIONS RELATED TO THE TORTIOUS INTERFERENCE THAT'S
22 CLAIMED IN THE CASE. BUT NEVERTHELESS HE CAME TO CALIFORNIA
23 TWICE.

24 WHAT ELSE HAS MR. WESTON DONE? LET ME BE A BIT MORE
25 GENERAL BEFORE I RESPOND TO YOUR SPECIFIC QUESTION.

1 OUR COMPLAINT WAS PLED IN STATE COURT WHERE THE PLEADING
2 REQUIREMENTS ARE SLIGHTLY MORE LENIENT.

3 THERE'S ONE FOR DECLARATORY RELIEF THAT MY CLIENTS TAKE
4 UP THE POSITION THAT THE ORAL AGREEMENT THAT MR. WESTON
5 CONTENDS FOR DOES NOT EXIST.

6 AND SECONDLY, THERE'S THE TORT CLAIM OF INTERFERENCE WITH
7 THE SALES AGREEMENT, AN ENTIRELY DIFFERENT CONTRACT, MY CLIENTS
8 ENTERED LAST YEAR THAT WE REFERRED TO IN THE BRIEFS THAT
9 REFERRED TO HMR HYDROGEN MASTER RIGHTS.

10 NOW IF YOU LOOK AT JURISDICTION UNDER EITHER OF THOSE
11 CLAIMS, IT'S APPROPRIATE FOR THE DECLARATORY RELIEF CLAIM IF
12 MR. WESTON HAS PURPOSELY AVAILED HIMSELF OF THE PRIVILEGE OF
13 DOING BUSINESS IN CALIFORNIA OR IF HE HAS IN THE ALTERNATIVE,
14 ENTERED INTO A CONTINUING OBLIGATIONS WITH A CALIFORNIA
15 RESIDENT.

16 NOW WHEN WE LOOK AT THE DECLARATORY RELIEF CLAIM A BIT
17 FURTHER, THE TRIPS TO CALIFORNIA ARE IMPORTANT TO THE
18 DECLARATORY RELIEF CLAIM NOT BECAUSE BY THEMSELVES THEY CREATE
19 THE CONTRACT THAT WESTON IS ADVOCATING, BUT BECAUSE THEY SHOW A
20 CONTINUING RELATIONSHIP, ONGOING OBLIGATIONS.

21 IF THE TRIER OF FACT ULTIMATELY WERE TO FIND THAT THE
22 ORAL AGREEMENT EXISTS, MR. WESTON WOULD BE FOUND TO HAVE
23 PERFORMED IT IN SUBSTANTIAL PART HERE IN CALIFORNIA.

24 IF ON THE OTHER HAND THE TRIER OF FACT DETERMINES THAT
25 THERE IS NO SUCH CONTRACT, JURISDICTION WOULD STILL LIE HERE

1 BECAUSE THE UNDERLYING OBLIGATIONS THAT CAME OUT OF A SEPARATE
2 RELATIONSHIP BETWEEN THE PARTIES, THAT IS WE, AS WE POINT OUT
3 IN THE OPPOSITION PAPERS AND IN THE DECLARATIONS, MR. WESTON
4 DID HAVE A RELATIONSHIP WITH BOTH OF THE PLAINTIFFS THAT DID
5 SPECIFICALLY CONCERN FROM ROUGHLY NOVEMBER OR DECEMBER OF 2009
6 GOING FORWARD, WORKING ON THIS HYDROGEN RELATED TECHNOLOGY.

7 SO HIS ACTIONS FIRST IN JANUARY OF 2010 TO GO TO SOUTHERN
8 CALIFORNIA IN JUNE OF 2010 TO COME TO SACRAMENTO WHICH OF
9 COURSE IS NORTHERN CALIFORNIA, BEAR DIRECTLY ON BOTH THE
10 EXISTENCE AND IF IT EXISTS THE PERFORMANCE OF THE ORAL
11 AGREEMENT THAT HE CONTENTS FOR AND THAT MY CLIENTS ARE SEEKING
12 A DECLARATION DOES NOT EXIST.

13 THEY DO NOT -- THOSE TRIPS DO NOT RELATE TO I CONCEDE
14 THEY DO NOT SUPPORT JURISDICTION FOR THE INTENTIONAL TORT WHICH
15 MR. WESTON COMMITTED FROM MICHIGAN, BUT THERE THE TEST IS
16 DIFFERENT.

17 THERE THE TEST IS WHETHER OR NOT MR. WESTON KNOWING THAT
18 IT WOULD CAUSE HARM IN CALIFORNIA TO A CALIFORNIA RESIDENT
19 ENGAGED IN AN INTENTIONAL ACTION DECIDED TO DISRUPT THE HMR
20 SALES AGREEMENT. AND CLEARLY HE DID.

21 AND WHAT WE'RE DEALING WITH ON THIS MOTION OF COURSE THE
22 STANDARD OF PROOF OR THE LEVEL OF PERSUASION IS MERELY THAT OF
23 A PRIMA FACIE CASE. THAT IS IF THE ALLEGATIONS, THE TESTIMONY,
24 THE CONTENTIONS OF THE PLAINTIFFS ARE BELIEVED, DULY
25 ESTABLISHED THAT THERE WAS A SUFFICIENT MINIMUM CONTACTS WITH

1 CALIFORNIA TO PERMIT IT TO BE REASONABLE FOR THIS COURT TO
2 EXERCISE JURISDICTION.

3 THE FIRST TWO PARTS OF THOSE I DISCUSSED. ONCE THOSE ARE
4 FULFILLED EITHER AS TO THE TORT OR AS TO THE CONTRACT CLAIM,
5 THEN THE CONCEPT OF PENDING JURISDICTION COMES IN AND SAYS,
6 WELL, THESE TWO CLAIMS ARE SO CLOSELY RELATED THAT IF
7 JURISDICTION EXISTS FOR EITHER ONE BUT NOT THE OTHER, THE ONE
8 FOR WHICH IT DOESN'T EXIST CAN BE TRIED IN THE SAME ACTION
9 UNDER THE CONCEPT PENDING JURISDICTION.

10 ONCE THOSE TWO ELEMENTS ARE ESTABLISHED AS WE BELIEVE
11 THEY HAVE BEEN YOUR HONOR THEN THE BURDEN SHIFTS TO MR. WESTON
12 TO MAKE A CONVINCING AND COMPELLING CASE THAT IT WOULD BE
13 UNREASONABLE FOR HIM TO HAVE TO DEFEND HERE.

14 AND WE BELIEVE THAT HE HAS NOT DONE THAT, HE HAS NOT COME
15 CLOSE.

16 GOING BACK FOR A MOMENT TO DISCUSS A LITTLE BIT FURTHER
17 THE NOTION OF THE PRIMA FACIE CASE, IF THERE ARE CONFLICTS IN
18 THE DECLARATIONS ABOUT ANY OF THE FACTS THAT WOULD IF TRUE
19 SUPPORT JURISDICTION, RESOLUTION OF THOSE CONFLICTS GOES IN
20 FAVOR OF THE PLAINTIFFS IN AN AND A FINDING OF JURISDICTION
21 SHOULD BE UPHELD.

22 WE HAVE A NUMBER OF VERY SIGNIFICANT CONFLICTS WHICH
23 HOPEFULLY I'VE ADEQUATELY POINTED OUT IN THE BRIEF AND I WON'T
24 GO THROUGH THEM.

25 BUT ONE OF PARTICULAR IMPORTANCE TODAY IN LIGHT OF

1 YOUR HONOR'S QUESTION IS THAT IS UNDER EITHER THE PURPOSEFUL
2 AVAILMENT WHICH IS THE CONTRACT ANALYSIS OR THE EFFECTS TEST
3 WHICH IS THE TORT ANALYSIS, THE COURT HAS TO ANALYZE WHETHER OR
4 NOT THERE WAS FORESEEABLE HARM CAUSED IN THE FORUM JURISDICTION
5 BY THE DEFENDANT EVEN FROM AFAR.

6 THE COURT: WELL, LET ME ASK ABOUT THAT FOR A MOMENT.

7 THE CLAIM OF TORTIOUS INTERFERENCE WITH RESPECT TO THE I
8 THINK YOU CALLED IT THE SALES AGREEMENT OR SEAMS CONTRACT,
9 WHERE WAS THAT AGREEMENT TO BE PERFORMED?

10 WE ARE NOT TOLD IN THE PAPERS, AS FAR AS I CAN SEE, ANY
11 OF THE DETAILS OF WHAT THAT AGREEMENT PROVIDED FOR OR REQUIRED.
12 DID IT REQUIRE PAYMENTS TO BE MADE IN CALIFORNIA?

13 MR. BOEHM: WELL, IT DIDN'T REQUIRE THEM, YOUR HONOR,
14 BUT MR. PICOT WAS A RESIDENT OF CALIFORNIA AT THE TIME OF THE
15 EXECUTION OF THAT AGREEMENT.

16 THE OTHER PARTIES TO -- AND HE WAS TO RECEIVE PAYMENTS IN
17 CALIFORNIA. THE OTHER PARTIES TO THAT AGREEMENT, THAT IS THE
18 BUYER OF HYDROGEN MASTER RIGHTS, HMR, IS A NEWLY CREATED
19 DELAWARE CORPORATION IT WAS CREATED IN AUGUST OF LAST YEAR
20 SPECIFICALLY TO BE THE BAYER UNDER THIS ENTITY.

21 THE PRINCIPLES BEHIND IT ARE AN INDIVIDUAL BY THE NAME OF
22 CARL LASOUVE, I BELIEVE I'M PRONOUNCING THAT CORRECTLY, WHO IS
23 A RESIDENT OF AUSTRALIA.

24 ANOTHER PRINCIPAL IS A GENTLEMAN MENTIONED IN THE BRIEFS
25 BY THE NAME OF TRACEY COATES. MR. COATES IS A RESIDENT OF

1 OHIO. THE CONTRACT WAS NEGOTIATED IN CALIFORNIA, IT WAS SIGNED
2 IN CALIFORNIA. WHERE IT IS TO BE PERFORMED ON THE BUYER'S SIDE
3 IN TERMS OF THE VARIOUS OBLIGATIONS THAT THEY HAVE UNDERTAKEN
4 IN THAT AGREEMENT IS NOT SPECIFIED. IT'S ENTIRELY UP TO THEM,
5 IT COULD BE ANYWHERE.

6 THEY ARE NOT TIED TO PERFORM ANY OF THEIR OBLIGATIONS AND
7 ANY PARTICULAR LOCALE. WHAT THEY ARE REQUIRED TO DO IS WHEN
8 THEY MEET CERTAIN MILESTONES IF YOU WILL, THEY HAVE TO MAKE
9 PAYMENTS. SOME OF THOSE MILESTONES ARE MEASURED BY CALENDAR,
10 OTHERS ARE MEASURED BY PROGRESS.

11 THE COURT: WELL, THAT WAS PRECISELY MY QUESTION.

12 WHERE AND TO WHOM WERE THOSE PAYMENTS REQUIRED TO BE MADE
13 UNDER THE TERMS OF THE CONTRACT?

14 MR. BOEHM: THEY WERE COMING, YOUR HONOR, TO TWO
15 SEPARATE INTELLECTUAL PROPERTY TRUSTS.

16 ONE SPECIFICALLY CREATED FOR THE BENEFIT OF MR. MANOS. AND
17 THE OTHER ONE SPECIFICALLY CREATED FOR THE BENEFIT OF
18 MR. PICOT.

19 IN BOTH INSTANCES THE INTELLECTUAL PROPERTY TRUSTS WERE
20 BASICALLY PASS-THROUGH'S WHERE EACH RESPECTIVE BENEFICIARIES OF
21 EACH TRUST WILL RECEIVE THE MONEY IN THEIR PLACE OF RESIDENCE.

22 THE COURT: WHERE WERE THOSE TRUSTS ESTABLISHED?

23 MR. BOEHM: IN WYOMING AND AUSTRALIA. BUT
24 THE JURISDICTION OF THE CREATION OF THE TRUST DOESN'T AFFECT
25 WHERE THE MONEY WENT WHICH IS THE IMPORTANT THING HERE.

1 AND WHEN MR. WESTON DISRUPTED THE SALES AGREEMENT WITH
2 HMR, THE PAYMENTS THAT WERE COMING TO MR. PICOT IN CALIFORNIA
3 AND THE PAYMENTS THAT WERE COMING TO MR. MANOS IN NEVADA
4 STOPPED.

5 SO THAT'S THE HARM AT LEAST AS TO MR. PICOT IN
6 CALIFORNIA, THAT'S THE HARM IN THE JURISDICTION THAT WAS
7 FORESEEABLE UNDER THE CALDER EFFECTS TEST BY REASON OF
8 MR. WESTON DOING WHAT HE DID, WE CONTEND HE GAVE A FALSE
9 DECLARATION TO HMR IN WHICH HE ASSERTED THAT HE HAD RECEIVED
10 THE SECRET TO THE FORMULA THAT'S ESSENTIAL TO THE TECHNOLOGY
11 THAT WAS SOLD.

12 HE HAD RECEIVED THAT INFORMATION ABOUT THE SECRET FORMULA
13 FROM MR. MANOS WHEN IN FACT THAT IS NOT TRUE. THEN HE ASSERTED
14 THE ORAL AGREEMENT TO HMR WHICH WE CONTEND DOESN'T EXIST
15 CLAIMING THAT HE WAS AN OWNER AND ENTITLED TO THE HAIR OF MONEY
16 THAT DISRUPTED THE MONEY FLOW TO THIS JURISDICTION.

17 THE COURT: WELL, IT MAY BE A FINE LEGAL ISSUE THERE
18 AS TO WHETHER OR NOT ASSUMING THERE WAS A TORTIOUS INTERFERENCE
19 WHICH CAUSED A BREACH OF THE CONTRACT, WHETHER THAT BREACH
20 OCCURRED WHEN PAYMENT WAS NOT MADE TO THE TRUST THAT YOU
21 MENTIONED IN WYOMING AND AUSTRALIA.

22 AND THE FACT THAT MR. PICOT WAS INJURED AT THE END OF THAT
23 CHAIN MAY NOT BE LEGAL SIGNIFICANCE WITH RESPECT TO THE
24 QUESTION OF THE INVOLVEMENT OF MR. WESTON IN THE AFFAIRS OF THE
25 CALIFORNIA. THAT'S THE ONLY REASON I ASKED THAT.

1 MR. BOEHM: JUDGE, IF I MAY COMMENT ON YOUR
2 OBSERVATION, THE PASSAGE OF MONEY THROUGH THE TRUST WAS
3 BASICALLY -- MAY BE CALLED AN EVENT, BUT IT WAS NOT A
4 SIGNIFICANT EVENT.

5 THE MONEY WAS DESTINED FOR MR. PICOT IN CALIFORNIA AND THE
6 ORDINARY COURSE OF THE SALES AGREEMENT HMR WOULD HAVE PAID
7 MONEY WHICH WOULD HAVE COME TO CALIFORNIA.

8 THE RESPONSE IN THE REPLY BRIEF AS TO THE FACT THAT
9 MR. PICOT HAS BEEN DAMAGED IN CALIFORNIA WHICH IS
10 JURISDICTIONALLY SIGNIFICANT HARM, IS THAT, WELL, WE HAVEN'T
11 CITED A CASE TO YOUR HONOR THAT SAYS WHEN YOU HAVE LESS MONEY
12 TO SPEND IN CALIFORNIA THAT THAT'S DAMAGED SOMEHOW.

13 BUT THAT'S EXACTLY WHAT DAMAGE IS. HAVING LESS MONEY
14 MEANS YOU'RE DAMAGED.

15 NOW THE OTHER PART OF THE HARM THAT I WOULD LIKE TO POINT
16 OUT TO YOU THAT DOES OCCUR IN CALIFORNIA, IS SOME OF THE DAMAGE
17 TO MR. PICOT AND MR. MANOS FLOWING FROM MR. WESTON'S TORT IS
18 THE IDEA THAT NOW MY CLIENTS ARE REQUIRED TO PROVE TO HMR THAT
19 MR. WESTON'S ASSERTIONS OF OWNERSHIP AND KNOWLEDGE OF FORMULA
20 ARE FALSE.

21 SO THAT WE ARE NOT IN THE POSITION OF BEING IN BREACH OF
22 THE SALES AGREEMENT OR AT LEAST THE WARRANTIES AND IN THE SALES
23 AGREEMENT. SO THE ATTORNEY'S FEES THAT ARE BEING INCURRED ARE
24 BEING INCURRED PARTLY IN CALIFORNIA.

25 NOW, CONCEIVABLY MY CLIENTS COULD HAVE HIRED AN ATTORNEY

1 IN MICHIGAN. THEY COULD HAVE BROUGHT THE SUIT IN MICHIGAN, BUT
2 THE HARM WOULD BE FELT IN CALIFORNIA AT LEAST IN TERMS OF THE
3 TWO ELEMENTS WE KNOW ABOUT TODAY IN WAY OF DAMAGE WHICH IS THE
4 LACK OF PAYMENTS FROM HMR AND THE EXPENDITURE OF ATTORNEY'S
5 FEES THAT'S BEING APPROXIMATELY CAUSED BY THIS TORT IN ORDER TO
6 SET THINGS RIGHT WITH HMR AND SHOW THAT THOSE WARRANTIES WERE
7 IN BREACH.

8 THOSE ATTORNEYS FEES ARE COMING IN SUBSTANTIAL PART FROM
9 CALIFORNIA AGAIN THAT'S ANOTHER COMPONENT OF THE JURISDICTIONAL
10 HARM.

11 BUT BEFORE YOUR HONOR ASKED HIS QUESTION THE POINT I WAS
12 GOING TO MAKE IS ON THE PRIMA FACIE LEVEL WE HAVE SHOWN THIS
13 KIND OF HARM.

14 THE ARGUMENT IS THAT WELL, LEGALLY A LACK OF MONEY ISN'T
15 DAMAGE BUT IN FACT IT IS. IT'S ALSO ACTUALLY CONCEDED
16 FACTUALLY BECAUSE IN THE COMPLAINT IN STATE COURT ACTION WE
17 ALLEGE THAT THE DAMAGE OCCURRED IN CALIFORNIA AND WAS
18 APPROXIMATELY CAUSED BY MR. WESTON'S TORT.

19 ALSO IN THE DECLARATIONS OF MR. PICOT ON THE MOTION WE
20 FACTUALLY SET OUT THOSE DAMAGES. AND THESE TWO, THE ALLEGATION
21 IN THE COMPLAINT AND THE FACTUAL SHOWING BY MR. PICOT ARE NOT
22 REBUTTED OR CONTROVERTED, AND THEREFORE THE COURT MUST TAKE
23 THOSE AS ACCEPTED.

24 THE OTHER POINT I WANTED TO MAKE ON THE DAMAGE ISSUE IS
25 THAT IN THE NINTH CIRCUIT THE LAW FOLLOWS THE RULE THAT ONLY A

1 PART OF THE HARM HAS TO OCCUR HERE. NOT ALL OF IT. SOME OF IT
2 CAN OCCUR IN OTHER JURISDICTIONS. SOME OF IT HERE OCCURRED IN
3 NEVADA TO MR. MANOS.

4 BUT THE NINTH CIRCUIT IS VERY, VERY CLEAR THAT AS LONG AS
5 THERE IS HARM HERE, THE BRUNT OF THE HARM DOES NOT HAVE TO
6 OCCUR HERE. NOT THE MAJORITY, NOT ALL OF IT, NOT EVEN AS THE
7 CASE IS USED, THE WORD BRUNT.

8 SO WHAT YOU HAVE IS AN INTENTIONAL TORT PERPETRATED FROM
9 MICHIGAN WITH KNOWLEDGE THAT IT WOULD CAUSE DAMAGE TO MR. PICOT
10 IN CALIFORNIA WHICH IT HAS IN FACT DONE, AND THAT MAKES OUT A
11 JURISDICTION FOR THE TORT CLAIM.

12 THE COURT: ALL RIGHT.

13 LET ME HEAR FROM THE DEFENSE, IT'S A DEFENSE MOTION, THEN I
14 WILL HEAR FROM THE PLAINTIFF.

15 MR. SCHWARTZ: THANK YOU, YOUR HONOR.

16 THE COURT: WHAT DO YOU SAY TO THE POINT THAT THERE'S
17 BEEN AN INTENTIONAL TORT HERE THAT CAUSED HARM TO MR. PICOT IN
18 CALIFORNIA SO THE THAT LONG ARM JURISDICTION WOULD BE AVAILABLE
19 UNDER INTERNATIONAL PROGENY OF ALL THE JURISDICTIONAL ISSUES.

20 MR. SCHWARTZ: WELL, IN THE NINTH CIRCUIT, IN THE
21 CASES ATTEMPTING TO INTERPRET AND UNDERSTAND THE SUPREME COURT
22 DECISION IN CALDER, THE NINTH CIRCUIT HAS REPEATEDLY SAID THAT
23 THE EFFECTS PART OF THIS TEST SHOULD NOT BE GIVEN PROMINENCE.
24 AND THE ISSUE WAS THE CONDUCT TARGETED THAT THE FORUM STATE,
25 NOT WHERE THEY ARE FORESEEABLE EFFECTS OCCURRING IN THE FORUM

1 STATE.

2 SO IN MJG ENTERS VERSUS CLOYD CITED BY THE PLAINTIFF, 210
3 U.S. DISTRICT COURT LEXUS 102579 IT'S A DISTRICT COURT CASE, IT
4 SAID ACTS THAT HAVE MERELY FORESEEABLE EFFECTS IN A FORUM STATE
5 ARE INSUFFICIENT.

6 THE PEBBLE BEACH DECISION OF THE NINTH CIRCUIT THE COURT
7 SAID HOWEVER, REFERRING TO THE CALDER TEST AS AN EFFECTS TEST
8 CAN BE MISLEADING.

9 FOR THIS REASON WE HAVE WARNED COURTS NOT TO FOCUS TOO
10 NARROWLY ON THE TEST'S THIRD PRONG, THE EFFECTS PRONG HOLDING
11 THAT SOMETHING MORE "IS NEEDED IN ADDITION TO A MERE
12 FORESEEABLE EFFECT."

13 NOW, WHAT IS THE CONDUCT THAT'S IN THE PAPERS BEFORE THE
14 COURT?

15 THE CONDUCT IN THE PAPERS BEFORE THE COURT RELATING TO
16 THE TORTIOUS INTERFERENCE CLAIM IS THAT MR. WESTON SPOKE WITH
17 INDIVIDUALS IN MICHIGAN AND POSSIBLY IN OHIO, ONE OF THEM BEING
18 A PRINCIPAL AT HMR. AND BY DISCUSSING THAT HE CAUSED HMR TO
19 STOP PAYMENTS BEING MADE.

20 THERE'S NOTHING IN THE RECORD ABOUT WHERE THE PAYMENTS
21 ARE TO BE MADE OR THERE'S A REQUIREMENT FOR THEM TO BE MADE IN
22 CALIFORNIA OR ANY PLACE ELSE. WE'VE HEARD FROM COUNSEL THAT
23 THEY WERE TO BE MADE TO FOREIGN TRUSTS WHICH THEN DISTRIBUTED
24 THEM.

25 BUT I WANT TO POINT OUT THAT IF MR. PICOT OR FOR THAT

1 MATTER, MR. MANOS HAD A HOUSE IN FLORIDA AND WERE USING SOME OF
2 THIS MONEY TO FURNISH THIS HOUSE OR PAY ITS MORTGAGE, WOULD
3 THAT, AND NOW THEY DON'T HAVE THAT MONEY, WELL THEN THERE WOULD
4 BE AN EFFECT IN FLORIDA. WOULD THAT VEST PERSONAL JURISDICTION
5 IN FLORIDA ON THIS CASE? IT'S ADMITTED IT WOULD NOT.

6 AND THAT'S A PURELY VOLUNTARY ACT ON THE PART OF
7 PLAINTIFFS TO DECIDE WHERE THEY INTEND THEIR MONEY.

8 THE SAME IS TRUE AS TO THIS ISSUE THAT THEY'VE HIRED A
9 CALIFORNIA ATTORNEY. THERE'S NOTHING IN THESE FACTS THAT
10 SUGGESTS THAT THEY WERE COMPELLED TO PURSUE ANY CLAIMS OR ANY
11 LEGAL RESPONSE BY HIRING AN ATTORNEY IN CALIFORNIA.

12 PRESUMABLY THEY WOULD, THE ISSUES WOULD BE TO HIRE AN
13 ATTORNEY IN MICHIGAN WHERE MR. WESTON RESIDES OR PERHAPS OHIO
14 WHERE HMR IS HEADQUARTERED.

15 I UNDERSTAND THAT THE CONTRACT HAS ITS OWN JURISDICTION
16 AND VENUE CLAUSE WHICH I BELIEVE IS IN NEW JERSEY, BUT THEY
17 DON'T PRESENT ANY EVIDENCE TO THE COURT AS TO WHY THIS
18 NECESSITATED THE EXPENDITURE OF LEGAL COSTS OR ANYTHING ELSE IN
19 CALIFORNIA.

20 AND PARTICULARLY, THEY SHOW NO CONDUCT BY MR. WESTON
21 TARGETING CALIFORNIA. THE ONLY DIRECT CONDUCT BY MR. WESTON
22 AGAINST ANY OF THE PLAINTIFFS IS THAT E-MAIL TO MR. MANOS WHO
23 IS IN NEVADA AND A TELEPHONE CALL TO MR. MANOS WHO LIVES IN
24 NEVADA.

25 SO EVEN MR. -- THE ALLEGED CONTACT BY MR. WESTON IS

1 SUPPOSEDLY DIRECTLY, THREATENING TO THE PLAINTIFFS, WAS
2 DIRECTED AT A DIFFERENT STATE.

3 THE COURT: LET'S TURN FOR A MINUTE TO COUNSEL'S
4 ARGUMENT ABOUT THE CLAIM FOR DECLARATORY RELIEF WITH RESPECT TO
5 THE EXISTENCE OR NONEXISTENCE OF AN ORAL CONTRACT WHICH THE
6 COMPLAINT ALLEGES IS BEING CLAIMED BY MR. WESTON AND THE
7 EVIDENCE THAT HE TRAVELLED TO CALIFORNIA ON TWO OCCASIONS.

8 COUNSEL SAYS IN THE ACTIVITY THAT WOULD CONSTITUTE IF THE
9 CONTRACT EXISTED, PARTIAL PERFORMANCE OF, THAT WOULD BE
10 SUFFICIENT, THEN FORMAL BASIS FOR ASSERTING PERSONAL
11 JURISDICTION OVER MR. WESTON WITH RESPECT TO THE DECLARATORY
12 JUDGMENT CLAIM?

13 MR. SCHWARTZ: WELL, I WOULD SUBMIT NOT, YOUR HONOR.

14 THE RECORD BEFORE YOU IS UNDISPUTED THAT WHATEVER
15 CONVERSATIONS OCCURRED, THAT EITHER GAVE RISE TO AN ORAL
16 CONTRACT OR FELL SHORT OF CREATING AN ORAL CONTRACT, OCCURRED
17 IN MICHIGAN.

18 THE ONLY PHYSICAL CONTACT THAT THEY POSIT AGAINST
19 MR. WESTON WHICH HE AGREES HE DID, IS THAT HE TRAVELLED TO
20 CALIFORNIA TO INSTALL A DEMONSTRATION OF THE TECHNOLOGY IN A
21 VEHICLE FOR SOMEONE WHO DID NOT ULTIMATELY INVEST IN THIS
22 TECHNOLOGY. HE DID IT TWICE AND NEITHER OF THEM BECAME
23 PARTICIPANTS IN THIS TECHNOLOGY. THEY DIDN'T -- THEY ENDED UP
24 AS INVESTORS OR PURCHASERS.

25 MOST SIGNIFICANTLY, IN MR. PICOT'S DECLARATION HE SAYS

1 THAT MR. WESTON CAME TO CALIFORNIA ON BOTH OCCASIONS AT THE
2 REQUEST OF MR. PICOT AND MR. MANOS.

3 IN OTHER WORDS, THEY SAID WE NEED YOU TO COME OUT HERE TO
4 DO THIS. AND HE CAME OUT HERE AND HE DID THAT. AND THE
5 QUESTION I WOULD SUBMIT IS THAT IS NOT PURPOSEFUL AVAILMENT OF
6 CALIFORNIA.

7 MR. WESTON DID NOT COME TO CALIFORNIA, SIT DOWN WITH
8 MR. MANOS AND MR. PICOT AND SAY OKAY, LET'S MAKE A DEAL, LET'S
9 FORM A CONTRACT, LET'S FORM AN ENTITY, LET'S DO THIS AND THAT
10 IN CALIFORNIA THEN RUN BACK TO MICHIGAN AND SAY, YOU CAN'T
11 TOUCH ME BECAUSE I'M IN MICHIGAN.

12 IF HE PURPOSEFULLY ENTERED INTO THE BUSINESS CONTRACT IN
13 CALIFORNIA, THAT WOULD BE ONE THING. BUT HERE HE'S JUST
14 RESPONDING TO THEIR REQUEST, AND THEY PAID HIM TO COME OUT
15 HERE.

16 SO IN FACT, HIS PAYMENT UNDER THEIR VERSION OF THE EVENTS
17 DOESN'T AMOUNT TO ANYTHING. AND IT IS NOT PART OF THE CLAIM
18 THAT HE'S SEEKING BECAUSE HE'S BEEN COMPENSATED FOR THAT
19 INDEPENDENT OF WHAT HE CONTENDS IS THE CONTRACT.

20 SO I WOULD SUBMIT THAT THAT DOES NOT MEET THE LEVEL OF
21 PURPOSEFUL AVAILMENT NECESSARY TO POSIT PERSONAL JURISDICTION.

22 THE PLAINTIFFS CONCEDE THAT THIS WHOLE ISSUE HAS TO DO
23 WITH WHETHER A SPECIFIC LIMITED JURISDICTION. IN OTHER WORDS,
24 WHETHER HIS CONDUCT IN CONNECTION WITH THE SPECIFIC CLAIMS IS
25 SUFFICIENT TO GIVE JURISDICTION HERE.

1 AND IN HIS TWO TRIPS TO CALIFORNIA HAVE NO RELATIONSHIP
2 TO THE FORMATION OF THE CONTRACT. AND NO RELATIONSHIP TO THE
3 INTERFERENCE WITH THE CONTRACT.

4 THE -- PART OF THE ISSUE IS AND CALIFORNIA USES AS CITED
5 IN THE CASES A BUT FOR TEST IN OTHER WORDS, WAS MR. WESTON'S
6 ACTIVITY, WERE MR. WESTON'S ACTIVITIES IN CALIFORNIA, HAD THEY
7 NOT OCCURRED WOULD THERE STILL BE A CLAIM, AND THE ANSWER IS
8 YOU BET YA, THERE WOULD STILL BE A CLAIM SO THEY ARE RELEVANT
9 TO THIS CLAIM. OF COURSE, HE WOULD STILL SAY IN MICHIGAN WE
10 DISCUSSED WE HAD A PARTNERSHIP AND THEY WOULD SAY NO, WE
11 DIDN'T.

12 AND HE WOULD STILL HAVE SPOKEN TO MR. COATS WHO WOULD
13 HAVE HMR SAY WE'RE NOT GOING TO PAY AND YOU THAT HAPPENED IN
14 MICHIGAN AND IT WOULD BE A COMPLETELY IRRELEVANT WHETHER HE HAD
15 OR HADN'T HAD TO TRAVEL TO CALIFORNIA ON THESE TWO TRIPS.

16 SO I WOULD SUBMIT THAT UNDER CALIFORNIA TEST FOR SPECIFIC
17 LIMITED JURISDICTION THERE ISN'T A PRIMA FACIE CASE BEFORE THE
18 COURT.

19 THE COURT: ALL RIGHT. THANK YOU.

20 AND IF I COULD RESPOND, I WILL BE AS BRIEF AS I CAN,
21 YOUR HONOR.

22 PICKING UP COUNSEL'S LAST POINT FIRST, HIS AND I DON'T
23 MEAN TO DO INJUSTICE TO IT BUT I WILL PARA PHRASE HIS COMMENT.
24 IT IS THAT EVERYTHING THAT EITHER LENT ITSELF TO THE CREATION
25 OR LENT ITSELF TO THE FINDING OF THE NONEXISTENCE OF AN ORAL

1 CONTRACT HAPPENED IN CALIFORNIA, I'M SORRY IN MICHIGAN.

2 THAT REALLY NOT THE CASE AND IT'S NOT THE CASE THAT'S
3 MADE OUT IN THEIR OPPOSITION OR IN THEIR OPPOSITION
4 DECLARATIONS EITHER ON THIS MOTION OR THE MOTION TO TRANSFER
5 WHICH WE HAVEN'T GOTTEN TO.

6 IN ALL OF THOSE, WITNESSES ARE LISTED, EVENTS ARE
7 SUMMARIZED AND DESCRIBED. THAT SHOW THAT THERE WAS AN
8 IMPORTANCE IN CALIFORNIA TO THE VERY ACTIVITY THAT GENERATED
9 THE SUCCESS FOR WHICH MR. WESTON NOW CLAIMS A ONE-THIRD
10 OWNERSHIP.

11 THAT SUCCESS INVOLVED HIM COMING TO CALIFORNIA IN JUNE
12 AND THEN AGAIN IN EARLIER IN JANUARY OF 2010.

13 THE IDEA THAT HE WAS INVITED TO COME HERE DOES NOT DEFEAT
14 JURISDICTION. NO ONE FORCED HIM. HE CAME, HE DID WHAT HE DID,
15 HE WAS PAID FOR HIS TIME AND HIS TRAVEL EXPENSES. IT WAS A
16 VOLUNTARY DECISION ON HIS PART TO COME.

17 AND IF YOU READ PARAGRAPH 13 OF HIS DECLARATION IN
18 OPPOSITION TO THE MOTION TO DISMISS, YOUR HONOR, YOU WILL SEE
19 THAT HE DESCRIBES HIS UNDERSTANDING OF WHAT HE WAS SUPPOSED TO
20 BE DOING UNDER THE ORAL AGREEMENT THAT HE ADVOCATES, AND IT WAS
21 TO ASSIST AT THE REQUEST OF MR. MANOS OR MR. PICOT IN FUND
22 RAIDING AND IN DEMONSTRATIONS OF THIS TECHNOLOGY.

23 WELL, THE LATTER IS PRECISELY WHAT HE DID HERE. MORE
24 OVER, FROM OUR STANDPOINT, PROVING UP THE CONTENTION THAT THIS
25 AGREEMENT DID NOT EXIST INVOLVED SHOWING THAT WHEN MR. WESTON

1 WAS HERE, HE DID NOT AS COUNSEL PUT IT, DO ANYTHING THAT WOULD
2 SUGGEST A LACK OF AN AGREEMENT.

3 HE DID. SPECIFICALLY ONE OF THE THINGS HE DID WAS TO
4 TELL THE PEOPLE THAT HE WAS DEMONSTRATING OR ASSISTING IN THE
5 DEMONSTRATION OF THE TECHNOLOGY TO, THAT IF THEY IN FACT FORMED
6 A JOINT VENTURE WITH MR. PICOT, THAT HE MR. WESTON WOULD LIKE
7 TO WORK FOR THE JOINT VENTURE.

8 AGAIN, A VOLUNTARY ACT SEEKING TO TAKE ADVANTAGE OF DOING
9 BUSINESS IN CALIFORNIA WHICH IS WHERE THAT PROPOSED JOINT
10 VENTURE WOULD HAVE BEEN LOCATED HAD IT IN FACT BEEN FORMED.

11 THE FACT IT DIDN'T DOESN'T FEATURE A DISTINCTION, THIS IS
12 MR. WESTON PLANTING HIS FEET AND HIS HEART IN CALIFORNIA IN
13 ORDER TO PROMOTE THIS ACTIVITY THAT IS THIS HYDROGEN TECHNOLOGY
14 OF WHICH HE CLAIMS TO BE AN OWNER.

15 NOW, GOING BACK TO SOME OF COUNSEL'S EARLIER POINTS HE
16 SAYS WELL IT'S MERELY FORTUITOUS THAT MR. PICOT ISN'T ABLE TO
17 SPEND HIS MONEY IN CALIFORNIA. HE COULD HAVE BEEN SPENDING IT
18 IN FLORIDA AND THIS WOULD BE NO JURISDICTION THERE. I CAN'T
19 AGREE MUCH LESS NO MATTER HOW I TRY.

20 MR. PICK IS A RESIDENT OF CALIFORNIA. HE DIDN'T TRAVEL
21 HERE ON VACATION HE DIDN'T COME HERE AND EAT AT A RESTAURANT
22 FOR WHICH HE COULDN'T FORWARD TO PAY THE BILL AFTER THIS TORT.
23 HE LIVES HERE. THE MONEY THAT WAS COMING TO HIM IS DAMAGE
24 HERE. IT'S A FAR DISTINCT MATTER FROM WHAT COUNSEL IS TALKING
25 ABOUT.

1 COUNSEL ALSO TOLD YOUR HONOR THAT THERE IS NO EVIDENCE
2 BEFORE THE COURT OF ANY DAMAGE HERE IN THE JURISDICTION.

3 IF YOUR HONOR READS MR. PICK'S DECLARATION IN OPPOSITION
4 TO THE MOTION TO DISMISS IN PARTICULAR PARAGRAPH 32 YOU WILL
5 SEE THAT HE DETAILS THE EXACT DAMAGE THAT I HAVE URGED TO
6 YOUR HONOR TODAY, THE TWO COMPONENTS OF IT, THE LACK OF PAYMENT
7 AND THE INCURRING OF ATTORNEY'S FEES IN THIS JURISDICTION
8 THAT'S BEING THE JURISDICTIONAL HARM.

9 ANOTHER POINT THAT COUNSEL MADE IS THAT YOU HAVE TO LOOK
10 FOR SOMETHING MORE THAN THE MERE EFFECT IN THE JURISDICTION. I
11 AGREE WITH HIM LEGALLY BUT WE HAVE A DIFFERENT SITUATION
12 FACTUALLY BEFORE THE COURT.

13 WHAT YOU HAVE IS MR. WESTON KNOWING THAT MR. PICK LIVED
14 IN CALIFORNIA, KNOWING THAT THE HMR CONTRACT HAD BEEN SIGNED,
15 FIRST THREATENING TO FIND AND EXPOSE SECRETS OUT ABOUT MR. PICK
16 WHICH HE SAID IN AN E-MAIL TO MR. MANOS, BUT EVEN THOUGH THAT
17 E-MAIL WASN'T SENT BY MR. WESTON TO CALIFORNIA, IT DEALT WITH
18 CAUSING HARM TO A CALIFORNIA RESIDENT.

19 THEN YOU HAVE THE PHONE CALL FROM MR. WESTON TO MR. MANOS
20 ADMITTEDLY IN NEVADA WHERE MR. WESTON SAYS UNLESS YOU DAVID
21 MANOS, AND BERNARD PICOT PAY ME \$250,000 RIGHT AWAY, I'M GOING
22 TO RUIN YOUR LIVES.

23 THAT'S HARM TO SOMEBODY IN CALIFORNIA WHICH WE CONTEND IS
24 PART OF THE TORT BECAUSE A FEW WEEKS LATER HE DID EXACTLY THAT.

25 HE WENT AND GAVE HMR A DECLARATION THAT I AM AN OWNER AND

1 DAVE MANOS TOLD ME THE SECRET TO THE FORMULA.

2 BOTH OF THOSE THING FIRST TRUE WOULD BE A BREACH OF
3 WARRANTIES IN THE HMR SALES AGREEMENT. SO THERE IS IN FACT A
4 SIGNIFICANT REASON TO HAVE JURISDICTION IN THIS COURT.

5 WHEN YOU LOOK FOR THE SOMETHING MORE THAN JUST AN IDLE
6 EFFECT HAPPENING SOMEWHERE IN SOME JURISDICTION, YOU HAVE A
7 PREMEDITATED SCHEME BY MR. WESTON TO CAUSE HARM TO A CALIFORNIA
8 RESIDENT.

9 AND IF YOUR HONOR WOULD TAKE THE TROUBLE TO READ THE
10 CASES I'VE CITED AT FOOTNOTE 13 ON PAGE 15 OF THE OPPOSITION
11 BRIEF TO THE MOTION TO DISMISS, THOSE CASES CATEGORICALLY AND
12 THERE ARE 5 OR 6 OF THEM, CATEGORICALLY SAY THAT JUST ONE ACT
13 THAT MEETS THESE OTHER CRITERIA'S OF INTENTIONAL AND CAUSING
14 AND EFFECT, CONFERS JURISDICTION.

15 THE CASES THAT COUNSEL CITES BY AND LARGE DEAL WITH
16 SOMEBODY WHO IS OPERATING AN INTERNET SITE.

17 AND THERE THE NINTH CIRCUIT WARNS YOU HAVE TO LOOK FOR
18 SOMETHING MORE THAN JUST AN EFFECT. TRUE. BUT NOT WHEN YOU
19 HAVE A TORT OUTSIDE OF THE INTERNET SETTING WITH A PASSIVE
20 WEBSITE THAT MIGHT CAUSE AN EFFECT SOMEWHERE.

21 THERE YOU NEED SOMETHING MORE. HERE WE HAVE IT IF IT'S
22 NEEDED AT ALL.

23 THE COURT: ALL RIGHT.

24 THANK YOU, COUNSEL. THANK YOU BOTH.

25 THE ARGUMENT HAS BEEN HELPFUL AND I DO EXPECT TO DECIDE

1 THESE MOTIONS HOPEFULLY BEFORE I LEAVE CALIFORNIA AT THE END OF
2 NEXT WEEK.

3 MR. BOEHM: JUDGE, JUST FOR YOUR INFORMATION, WE HAVE
4 A CMC BEFORE JUDGE DAVILA ONE WEEK HENCE.

5 SO IF YOUR HONOR IS ABLE TO DECIDE THIS BY THEN THAT
6 WOULD BE HELPFUL FOR JUDGE DAVILA.

7 THE COURT: I WILL TRY.

8 MR. BOEHM: NOW THE OTHER QUESTION, AND I DON'T KNOW
9 WHETHER YOU WANT TO GET INTO THIS, WE HAVE A CMC STATEMENT DUE
10 TOMORROW.

11 THE COURT: WELL, I DON'T THINK I WILL GET INTO THAT.

12 MR. BOEHM: WE SHOULD JUST FILE IT --

13 THE COURT: JUST FILE IT, YES.

14 IF THAT'S THE OUTSTANDING OBLIGATION UNDER JUDGE DAVILA'S
15 ORDER OR THE LOCAL RULES THEN IT NEEDS TO BE COMPLIED WITH.

16 MR. BOEHM: I UNDERSTAND, YOUR HONOR.

17 ONE LAST POINT, AND THAT IS OF COURSE COUNSEL HAS BROUGHT
18 A SECOND MOTION

19 THE COURT: I UNDERSTAND. I THINK THAT'S BEEN
20 THOROUGHLY BRIEFED.

21 MR. BOEHM: IT HAS. I WILL SUBMIT THAT, YOUR HONOR.

22 THE COURT: THANK YOU.

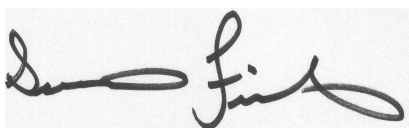
23 MR. BOEHM: THANK YOU, JUDGE.

24 (WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE
25 CONCLUDED.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

A handwritten signature in black ink, appearing to read "Summer A. Fisher", is written over a light gray rectangular background.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

DATED: 9/25/12